Supreme Court, U.S.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HARDWICK BROTHERS COMPANY II,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Were the Court of Appeals and the Court of Federal Claims correct in holding — contrary to the Supreme Court's decision in *United States v. Spearin* and other cases, and contrary to seven other circuits — that an owner, here the United States Army Corps of Engineers, does not impliedly warrant the details of the character, location and nature of the work set out in plans and specifications furnished to its bidders on large public works projects?

    a. Should the trial court and Court of Appeals be upheld in their finding that no implied warranty exists when plans and specifications are characterized as "performance" type plans and specifications and yet contain inaccurate data about the character, location, nature, and details of the work?

2. Should the Court of Appeals have sanctioned the trial court finding that a bad faith legal standard applies in a claim of frustration and hindrance of performance of a federal public works contract and ignore this Court's precedent in *United States v. Smith*, 94 U.S. 214 (1876), and its progeny, and the Federal Circuit's own precedent which impose no requirement that bad faith be proved?

STATEMENT PURSUANT TO RULE 29.6

The interest of the partners of Hardwick Brothers Company II were acquired by Hardwick, Inc., in 1979-80 in exchange for cash or stock in Hardwick, Inc. There are no parent companies or subsidiary companies of Hardwick, Inc.

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Petitioner, Hardwick Brothers Company II ("Hardwick"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is not published, but can be found at 1998 U.S. App. Lexis 20861, August 24, 1998 (App. A). The opinion of the Court of Federal Claims regarding liability in *Hardwick Brothers Company II v. United States*, 88-CV-702 is reported at 36 Fed. Cl. 347 (App. B). The subsequent order of the Court of Federal Claims regarding certain damages is not published and is not relevant to the issues presented.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit ("Court of Appeals") was entered on August 24, 1998. The Court of Appeals denied a timely petition for rehearing on November 2, 1998 (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional or statutory provisions involved in this matter. This matter involves fundamental questions of federal common/government contract law.

STATEMENT OF THE CASE

1. Hardwick was a large family-held heavy contractor which had been involved (including its predecessors) in the construction of levees throughout the Mississippi and Missouri River basins since the 1920's under contracts with the United States Army Corps of Engineers ("Corps") as part of the Corps' mission to design and build levees for the protection of inhabitants and their property in those two great river valleys.

2. In 1977 Hardwick entered into a contract for the construction of a levee near Brunswick, Missouri ("the Project"). The Corps designed the Project, furnished the plans and specifications, and administered the contract after award.

3. The Corps designed the Project to protect agricultural lands, in part, to contain Palmer Creek, which flows southwest into Cut-Off Lake, an oxbow lake, before flowing south into the Missouri River. The Corps' design carried the levee's centerline for a substantial distance alongside the western boundary of Cut-Off Lake. The plans showed that the site had a very flat topography, substantial portions of which were between 620 and 630 MSL (mean sea level). Palmer Creek was shown as flowing through the job site (with only a 10 to 30 foot width and shallow U-shaped banks) with all of the flow, at one point, directed into the head of Cut-Off Lake having at its mouth a restrictive rock weir. The Palmer Creek levee was designed to add a new concrete outlet structure below the outlet of Cut-Off Lake.

4. The Plan's 620 contour line was shown as crossing over the original rock weir. The Plans specified that this weir was to remain in place. Hardwick's survey long after the job was done determined that the actual height of this weir was at 618.5 MSL. 36 Fed. Cl. at 360.

5. Various Corps data collected during its design work suggested that at about six or seven feet below its banks, the Missouri River could begin to flow into Palmer Creek. As the river level increased it could back flow far enough to reach Cut-Off Lake and raise its level. Corps studies showed that during the years 1970-1973 there were approximately 711 days in which no Palmer Creek discharge would have been possible. This fact was not disclosed in the plans.

6. Hardwick won the contract after sealed bids were opened. It was the low bidder at $3,066,915. The second lowest bid was $3,187,455. The government's pre-bid "reasonable contract estimate" was $3,137,725.50.

7. The trial court found that within months after work started that "the Corp's field representatives and higher level staff recognized that in certain critical areas west of the lake Plan Elevations were in error." 36 Fed. Cl. at 369. The trial court further found that

> although the Corps learned of possible contour errors in December 1977, and conducted an investigation of the matter the following month, the Corp never advised plaintiff in writing that the investigation had been undertaken.

8. By agreement with local interests before bid letting, the Corps determined that a minimum desirable lake level of 620 MSL should be maintained during construction. This was not disclosed in the plans or specifications nor communicated to the bidders. The level the Corps chose during construction was 620 MSL.

9. The trial court recognized that the inaccurate elevation shown for the original rock weir was used by Hardwick as a

reference when submitting Hardwick's operation plan for a ditch for the diversion of Cut-Off Lake around the new Cut-Off Lake outlet structure in the center of the project. 36 Fed Cl. at 369. The trial court found that

> the plaintiff clearly planned from the beginning to lower the lake to 618.MSL (later to 618.5 MSL), as shown by its bid papers in connection with construction of a diversion ditch around the weir.

36 Fed. Cl. at 388. The trial court noted that Hardwick's "controlling" elevation for building the diversion ditch was the "grade of the existing rock weir", the elevation which the trial court found the plans stated was 620 MSL. Since the original rock weir was actually 618.5 MSL, then it would have been necessary to lower the lake elevation to 617 MSL in order to lower the lake 1.5 feet below the original rock weir.

10. Instead of lowering the lake to elevation 617 MSL, a foot and a half from the top of the original rock weir, Hardwick maintained the lake level at 618.5 MSL (the top of the original rock weir) when it thought it was "lowering the lake". Additionally, when Hardwick restored the elevation control in the diversion ditch to the 620 MSL shown on the plans for the original rock weir for a period of 7 months in each of the first two years of construction, Cut-Off Lake was raised 1.5 feet higher than the original rock weir.

11. With regard to the frustration of plaintiff's job performance by the non-disclosure of the contour errors and the raising of the Cut-Off Lake, the trial court found that:

> sufficient proof is simply lacking for this court to find that defendant's conduct was improper or constituted bad faith. The Corp's witnesses

> convincingly testified that in this case the Corp's officials responsible for the Project believed in good faith that any errors in the contour lines established by aerial photogrammetry were within permissible limits. The court finds in these circumstances that plaintiff has failed to prove that defendant violated professional standards with respect to the contours by failing to disclose the results of its January 1978 investigation of possible contour areas.

36 Fed. Cl. at 385.

12. Without addressing Hardwick's claim of government frustration of performance, the Federal Circuit upheld the opinion below which used a "bad faith" standard to review the non-disclosure aspect of the weir contour error, 36 Fed. Cl. at 385, and which mislabeled Hardwick's claim of Corps "imposition of unreasonably high lake levels" as one for "over inspection". 36 Fed. Cl. at 405.

13. The error in the elevation shown for the original rock weir resulted in the Cut-Off Lake in the center of the project being held for long periods of time during construction at levels a foot and a half higher than the original rock weir. This coupled with the plan errors on the topography of the ground, rain in the Palmer Creek watershed, and Missouri River backwater into Palmer Creek and Cut-Off Lake resulted in high lake levels and substantial portions of the project site being flooded for long periods of the project duration. This excess water so saturated the soil that Hardwick's equipment could not function, bogged down, and required more frequent repairs. This frustrated performance. Hardwick was required to modify its methods of construction, obtain alternate borrow sources, and generally adopt more expensive and costly procedures for

completing the project. Consequently, Hardwick's completion of the project was inordinately delayed and Hardwick suffered significant monetary losses. 36 Fed. Cl. at 421.

14. In addressing Hardwick's complaint about the plan contour errors the trial court held that because the specifications involved were "predominately performance" that *United States v. Spearin*, 248 U.S. 132 (1918) was "not availing" 37 Fed. Cl. at 411-412. This conclusion was upheld on appeal by a Federal Circuit panel holding that:

> the Spearin doctrine applies only where the government provides detailed design specifications. . . . Hardwick also argues that the specifications provided by the Corps here are actually design, not performance specifications, but in making this argument, Hardwick ignores the true nature of design specifications. Hardwick argues that the contour data was extensive and detailed, but the contour data goes to the site, and makes no representations about the character of the levee system to be built in order to satisfy the Corps.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW REPRESENTS A DRAMATIC SHIFT IN THE JUDICIAL TREATMENT OF THE ANCIENT DOCTRINE OF THE OWNERS IMPLIED WARRANTY OF THE PLANS AND SPECIFICATIONS AS ENUNCIATED IN THIS COURT'S OPINION IN *UNITED STATES v. SPEARIN*, 248 U.S. 132 (1918) WHICH PROPERLY PLACES ON THE PARTY WHO PREPARES AND FURNISHES THE PLANS AND SPECIFICATIONS THE RISK OF LOSS FOR DEFECTS AND INACCURACIES REGARDLESS OF HOW THEY ARE CHARACTERIZED.

The Federal Circuit, which hears almost all appeals of government contract claims, expressly held in this case that the owners implied warranty found in *United States v. Spearin*, 248 U.S. 132 (1918) does not apply to "performance" specifications. This sets up a dichotomy in the coverage of the implied warranty between "design" and "performance" specifications in government contracts. This dichotomy is a false one which restricts the ancient doctrine of *Spearin*:

> The insertion of the articles **prescribing the character, dimensions and location** of the sewer imported a warranty that if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance. The obligation to examine the site did not impose upon him the duty of making a diligent inquiry into the

> history of the locality with a view to determining, at his peril, whether the sewer specifically prescribed by the Government would prove adequate. The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract.

248 U.S. at 137.

Use of "design/performance" criterion for the application of *Spearin* has been soundly criticized by law review authors, *see* Golden, Kevin C. & James W. Thomas, "The Spearin Doctrine: The False Dichotomy Between Design and Performance Specification", 25 Pub. Cont. L.J. 47 (1995), and also criticized by leading experts in the field of government contracts. Ralph C. Nash, Jr. "Government Contract Changes" 2d ed., Federal Publications, Inc. (1991), pp. 13-8 to 13-12.

The government's implied warranty is based on the government's responsibility for preparing the plans and specifications — if inaccurate details are furnished by the plans and specifications which cause difficulties during performance, the government should be responsible. *Id. See also* Federal Procurement Law, Vol. II, by Ralph C. Nash, Jr. And John Cibinic, Jr., (1980), pp. 1011 to 1021.

This Court did not use the "design" or "performance" categories in this Court's decision in *Hercules Inc. v. United States*, 516 U.S. 417 (1996) restating *Spearin* thusly:

> This Court held that "if the contractor is bound to build according to plans and specifications prepared

> by [the Government], the contractor will not be responsible for the consequences of defects in the plans and specifications."
>
> When the Government provides specifications directing how a contract is to be performed, the Government warrants that the contractor will be able to perform the contract satisfactorily if it follows the specifications. **The specifications will not frustrate performance or make it impossible**. It is quite logical to infer from the circumstance of one party providing specifications for performance that that party warrants the capability of performance.

(Emphasis added). To say that once the "performance" label applies that an implied warranty of the adequacy of government furnished plans and specifications has no force elevates form over substance — *a priori* categories over judicial analysis and reasoned review. With the greatest respect, Hardwick politely requests that the Federal Circuit's opinion be reviewed by this Court.

II.

THE FEDERAL CIRCUIT'S DECISION LIMITING *SPEARIN* TO ONLY "DESIGN SPECIFICATIONS" IS AN EXTREME LIMITATION ON THE SCOPE OF THE *SPEARIN* WARRANTY; IT EFFECTIVELY DEPRIVES MOST PUBLIC WORKS CONTRACTORS OF ANY OPPORTUNITY TO BRING CLAIMS AGAINST THE GOVERNMENT FOR BREACH OF ITS IMPLIED WARRANTY OF THE PLANS AND SPECIFICATIONS.

A. *SPEARIN* SHOULD NOT BE LIMITED TO DESIGN SPECIFICATIONS BECAUSE THE IMPLIED WARRANTY ADVANCES THE PURPOSE OF PROMOTING ACCURACY IN DATA SUPPLIED IN GOVERNMENT FURNISHED PLANS AND SPECIFICATIONS, AND PROTECTS THE BIDDERS AGAINST UNFORESEEN ERRORS AND THE GOVERNMENT AGAINST BID CONTINGENCY COSTS FOR SUCH RISKS.

B. THE FEDERAL CIRCUIT'S ATTEMPT TO CREATE A "BRIGHT LINE" RULE CREATES CONFUSING QUESTIONS FOR THE ADMINISTRATION OF GOVERNMENT CONTRACTS.

The Federal Circuit's decision is especially insidious because almost all construction contracts allow a contractor to determine the "means and methods" for performing its work. *See, e.g.,* American Institute of Architects Standard Form of Agreement between Owner and Contractor, A-201 (1997). 3.3.1, 3.12.10, 4.2.2, 4.4.7, 9.4.2. Thus, a contractor can select the type of machinery, cranes, bulldozers, cement mixers and other means, methods and techniques for building its jobs.

The trial court here took the discretion given contractors to select "means and methods" and used that to characterize the specifications as "performance". 36 Fed. Ct. at 411. The lower courts transferred the term "performance specification" which has traditionally been intended to denote specification of the capabilities of the thing or object of the procurement itself (*e.g.*, provide a motor capable of 4000 RPM) to the method and manner of performance or building or making the thing itself (*e.g.*, the motor shall have an aluminum housing or a piston of x dimension will go in a cylinder of y dimension). Since almost every specification leaves some discretion to bidders as to the method and manner of performance, the net result is to place a wide class of government contracts outside the protective shield of *Spearin*.

The fact that contractors are given discretion on how to build their jobs should not diminish the owner's obligation to provide accurate data and assure that the plans are suitable. Given the fact that almost all specifications allow construction contractors to choose "means and methods," the Federal Circuit's decision upholding the trial court's characterization of the specifications as "performance" (since the contractor could choose means and methods) and then limiting *Spearin* to only "design specifications" effectively deprives most public works contractors of the protection of the implied warranty of *Spearin*.

This is a matter of important social policy. As numerous treatises and articles point out, the purpose of the implied warranty of the owners plans and specifications is to promote accuracy and to place upon the party who actually has control over what information is provided in the contract documents the responsibility that they be accurate, complete and suitable. Indeed as older precedent of the Federal Circuit's predecessor noted in *J.L. Simmons Co. v. United States*, 188 Ct. Cl. 684, 724, 412 F.2d 1360 (1969):

> [T]he *Spearin* rule is not dependent on a finding of independent fault or negligence. The *Spearin* rule originates and is inherent in the Government's undertaking to prepare adequate plans and specifications.

This ancient policy protects bidders, who rely upon the representations made by the owner in making hard dollar bids, against unforeseen errors. Moreover, the government and other owners are likewise protected against additional cost contingencies in bids because contractors can place their faith in the accuracy and suitability of the plans and specifications they are furnished to bid on. *See* Nash & Cibinic, Federal Procurement Law, 1980 Vol. II, p. 1015.

It would be important if the Supreme Court accepted this case. The Federal Circuit's attempt to adopt a "bright-line" distinction between "performance" and "design" contracts can only lead to confusion in the administration of government contracts. Indeed one case cited by the panel, *U.S.A. Petroleum Corp. v. United States*, 821 F.2d 622, 624 (Fed. Cir. 1987) applied *Spearin* in a situation where only performance was called for (a contract for the delivery of oil). One leading case involving performance specifications (and which talks at length about their nature), refers only to "detailed" specifications when describing the warranty. *J.D. Hedon Construction Co. v. United States*, 347 F.2d 235, 241 (1965). Even the current chief judge of the Federal Circuit has criticized the distinction. *Blake Construction, Inc. v. United States*, 987 F.2d 743 (Fed. Cir. 1993) (Mayer) (distinction is merely a rule of thumb which does not dictate the resolution of a case). The distinction has also been criticized by the boards of contract appeals. *Machinery Assoc., Inc., ASBCA* 14510, 14 G.C. ¶ 363, 72-2 DCA ¶ 9476, 1972 W.L. at p. 12; and *General Instrument Corporation*, DOTCAB 67-9A, 14 G.C. ¶ 332, 72-1 BCA

¶ 9389 (Argument over design or performance misses the point, 1972 W.L. 1086 at p. 22).

The net result of the decision below is to inject tremendous uncertainty into government contract relations and to dramatically change the scope of the *Spearin* implied warranty. Rather than focusing on the specific factual details that are inaccurate in the plans and specifications, and whether the inaccurate details caused an increase in the costs of the contractor's performance, the contest will evolve into a dispute over which *a priori* categorization to apply to particular plans and specifications as a whole. This is an approach which will introduce capriciousness into the adjudication of defective specification claims because no fixed or adequate standards exist to make the design/performance categorization. At its most basic level, warranty theory should apply even when one is provided data to use to do the "design" work for the job as part of a performance obligation, since inaccurate data can harm one doing the design or selecting the means and methods of performance just as surely as one called upon to follow a fixed design. It is an important and long-standing public policy that the factual representations of the Government to its contractors should be accurate. Since the decisions below ignore this basic point, this case merits Supreme Court review.

III.

HARDWICK HAS BEEN STRIPPED OF ITS TRADITIONAL LEGAL RIGHT OF HAVING THE PLANS AND SPECIFICATIONS AND THE ADMINISTRATION OF ITS CONTRACT EVALUATED AS TO WHETHER ITS PERFORMANCE WAS FRUSTRATED OR HINDERED BY THE TRIAL COURT FINDING, THEN THE FEDERAL CIRCUIT UPHOLDING THAT A "BAD FAITH" LEGAL STANDARD APPLIES TO CLAIMS OF FRUSTRATION AND HINDRANCE.

Hardwick raised the issue of whether the trial court erred in employing a "bad faith" standard under the theory of hindrance/frustration of performance. The appellate panel did not address this point in its opinion. This is a critical issue that should be addressed as no bad faith requirement has been imposed in the basic law that governmental frustration of contract is a breach, for over a hundred years. *United States v. Smith*, 94 U.S. 214 (1876); *United States v. Barlow*, 22 S. Ct. 468, 474, 184 U.S. 123, 137, 46 L. Ed. 463 (1902). This is also a deviation from Federal Circuit authority that all contracts contain an implied provision that neither party will "do anything to prevent performance thereof by the other party or commit any act that will hinder or delay performance." *Peter Kiewit Sons' Co. v. Summit Construction Co.*, 422 F.2d 242, 257 (8th Cir. 1969); *Lewis-Nicholson, Inc. v. United States*, 550 F.2d 26, 32 (1977) (obligation to cooperate is an affirmative and positive duty) (citing *Kehm Corp. v. United States*, 93 F. Supp. 620, 623 (1950)) (hereafter collectively called the "hindrance doctrine").

Williston includes a failure to give notice to the other party of facts (such as the contour errors here) which are necessary for performance as "prevention" of performance. Samuel

Williston and George Thompson, Jr., *Law of Contracts*, § 677 (1938) n.13, citing *Rest. Contracts* § 295; *United States v. Peck*, 102 U.S. 64, 26 L. Ed. 46 (1880); *United States v. United Engineering & Constructing Company*, 234 U.S. 236, 34 S. Ct. 843, 845, 58 L. Ed. 1294 (1913). *See also Restatement (Second) of Contracts* § 245 (1981); 17A *Am. Jur. 2d. Contracts*, § 717 (1991). The simple fact is that the weir elevation was overstated by 1.5 feet. This resulted in the lake not being lowered and even being raised by 1.5 feet. Regardless of whether any "bad faith" exists, this plan error and its subsequent non-disclosure frustrated Hardwick's performance. Review by this Court is merited in order to secure compliance with this Court's decisions and uniformity in the Federal Circuit's case law.

CONCLUSION

This case presents two questions of exceptional importance to the field of government contract law. First, whether the owners implied warranty of furnished plans and specifications should be limited to "design" specifications and second, whether a "bad faith" standard should be added to claims for frustration of contract. Both questions involve such departures by the lower courts from ancient and accepted doctrines of government contract law that this court should exercise its power of supervision over important matters of federal policy and common law. Accordingly, Hardwick's petition for writ of certiorari is meritorious and should be granted in order to address the important matters of public policy raised by this case.

Respectfully submitted,

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